PP v. FANG JIN ZHONG

HIGH COURT MALAYA, SHAH ALAM
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL TRIAL NO: 45B-106-05-2012]
25 NOVEMBER 2014

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Degree of probability or likelihood that death would result from particular act – Fatal stab wounds inflicted on deceased – Degree of mens rea required under s. 300 Penal Code – Circumstantial evidence – Whether accused had intention to inflict injury – Whether injury on deceased sufficient in ordinary course of nature to cause death – Provocation – Whether injury inflicted was proportionate to provocation causing accused to be deprived of his self control – Whether accused acted in self defence – Whether exceptions under s. 300 Penal Code applied*

EVIDENCE: *Confession – Admissibility of – Statement made by accused – Whether words uttered amounted to confession – Whether admissible under s. 17 Evidence Act 1950 – Anandagoda v. The Queen*

The accused was charged for murder, an offence punishable under s. 302 of the Penal Code. In brief, the facts revealed that both the accused and the deceased were employees of Kilang Press Metal Berhad ('the factory'). On 6 July 2011, the deceased was found murdered in the store room located at the factory premises. The human resource and administration manager at the factory ('SP4') testified that at about 10.30am, the accused came into his office and said, *inter alia*, that he had an argument with the deceased and as a result, he stabbed the deceased. SP4 also testified that from his room, he could see the deceased lying outside on the floor before being taken to the hospital. SP7, an employee in the factory testified that around 10am, while he was working at his work station, he heard noises coming from the direction of the store room. Upon inspection, SP7 said that he saw the accused standing behind the deceased and the deceased was bleeding around the stomach region whilst sitting on the floor with his legs crossed. SP7 testified that he did not see anyone else in the room at that time. He then left the store room and informed two managers about the incident. Later, the deceased was brought out of the store room. The pathologist ('SP11') testified that three stab wounds were inflicted on the deceased's chest and two were at the back. She testified further that two of those wounds, namely, wounds no. 4 and no. 5 as described in P10 were the fatal wounds on the deceased. It was the prosecution's case that the accused had the intention of causing bodily injury to the deceased and that injury intended to be inflicted was sufficient in the ordinary course of nature to cause the deceased's death pursuant to s. 300(c) of the Penal Code. During defence, it was submitted that before the incident took place, the accused was in the store room with the deceased and another person, known as David. An argument took place between the deceased and David and the latter left the store room as a result

of the fight he had with the deceased. The accused further testified that when he was alone with the deceased in the store room, the deceased took an object which resembled a cable and started to swing it over his head. As the deceased swung the said object over his head, the accused alleged that he told the deceased to stop it as he was already having problems with his child's education fees. The accused testified that an argument took place between them and the deceased swung the cable like object which hit the accused on his left shoulder. In order to protect himself from being injured by the deceased, the accused testified that he took an instrument and stabbed the deceased three times in the stomach. At that moment, the accused alleged that he did not know or foresee what injuries the deceased would sustain. The defence, however, submitted that fatal wounds no. 4 and no. 5 were caused by someone else. It was alleged that David would have inflicted the fatal stab wounds during the interval of time that had elapsed between SP7 exiting the store room to get help and the time taken for the two managers to reach the store room after the accused exited the said room. In the alternative, the defence submitted that the accused was provoked when he inflicted the stab wounds during a sudden fight and that he did not possess the necessary intention to commit murder under s. 300 of the Penal Code.

Held (convicting accused for murder and sentencing him to death by hanging):

(1) The difference between ss. 299 and 300 of the Penal Code lies in the degree of probability or likelihood that death would result from a particular act, *ie*, the degree of risk to human life. On the facts, the prosecution must prove that (i) the deceased had a bodily injury present as a result of which he had died; (ii) the deceased died as a result of the stab wounds inflicted upon him; (iii) the injuries were inflicted by the accused and there was intention to inflict such injury where the act was not accidental or unintentional or that some other kind of injury was intended; and (iv) such bodily injury was sufficient in the ordinary course of nature to cause death. (paras 33 & 36)

(2) SP7 was an honest witness who merely described the events as he saw it. He was sure that at the time he first entered the store room, he only saw the deceased and the accused. It was not suggested to SP7 that he had a bone to pick with the accused or that he favoured the prosecution's version for any reason whatsoever. Neither did his demeanour suggest that he appeared evasive or in any manner to suggest that he might not be telling the truth. On the other hand, SP4 had the occasion to witness the chaos from the aftermath of the incident from his room. As a result of the argument, SP4 testified that the accused informed him that he had stabbed the deceased. The accused voluntarily went to see SP4 and there was no evidence nor was it suggested that the accused was under any compulsion to see SP4 about the incident. He did not know the condition of the deceased at the time the accused was with him. Further,

SP4 was not the immediate superior of the accused and was not a person in authority. Under the circumstances, the statements made to SP4 were not caught by the prohibitory provisions of s. 24 of the Evidence Act 1950. (paras 37 & 38)

(3) Section 17(2) of the Evidence Act 1950 states that a confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence. On the facts, the credibility of SP4 as a witness was not seriously challenged and his testimony as a credible witness therefore holds intact. Further, he was not an interested witness with any vested interest in giving such evidence against the accused. Therefore, the words uttered by the accused to SP4, without reference to any extrinsic factors that may have prevailed at the time, that he had stabbed the deceased as a result of an argument and consequently, the accused told SP4 to handle it and that he would follow whatever was decided amounts to a confession under s. 17 of the Evidence Act 1950 (*Anadagoda v. The Queen*; refd). (paras 39, 40 & 44)

(4) SP11's testimony showed that the injuries inflicted upon the deceased, namely wounds no. 4 and no. 5, were sufficient in the ordinary course of nature to cause the death of the deceased. The fact that the injuries were inflicted by the accused was sufficiently proved by the evidence of SP7 who heard noises coming from the store room and found the accused standing behind the deceased who was sitting in a cross legged position on the floor and was bleeding. This piece of evidence showed that the accused was last seen with the deceased before the demise of the deceased. The only reasonable inference was that it was none other than the accused who had inflicted the stab wounds on the deceased. The accused's confession to SP4 further fortifies the view that the accused had inflicted the fatal wounds on the deceased. From the nature of the weapon used and the vital organs that were targeted, there was present the necessary degree of *mens rea* required under s. 300 of the Penal Code in that the death of the deceased was the most probable result. (paras 45, 49 & 50)

(5) The facts adduced by the prosecution were based on circumstantial evidence. There were no eye witnesses to the incident that led to the death of the deceased. Considering all the circumstances of the case, the irresistible conclusion pointed towards to no one other than the accused who had inflicted all the stab wounds upon the deceased which caused his death on the day and time in question. Thus, the prosecution succeeded in establishing a *prima facie* case against the accused (*Sunny Ang v. PP*; refd). (paras 52, 53, 61 & 66)

(6) There was no independent evidence to suggest David's presence in the store room when the incident took place. It was a mere invention on the part of the accused to set the stage for the alleged reappearance of David at the scene of the crime a few minutes later. The accused also never

A mentioned David's alleged involvement in the incident when he told SP4 what had happened. If the accused strongly felt that David had a part to play in the episode, he would have undoubtedly told SP4 about it. Further, the accused did not mention in his recorded statement to the police about the fact that David and the deceased had a quarrel. As such, B the alleged quarrel between David and the deceased in all reasonable probability never took place. The interval of time for David or anyone else to have entered the store room unnoticed and to inflict the fatal wounds and exit undetected just as fast was hardly probable in the circumstances. As such, it was difficult to believe the accused's version C about the involvement of David as the person who had stolen in but for a moment and inflicted the fatal wounds upon the deceased. (paras 86 & 87)

(7) Provocation operates as an exception to the offence of murder under s. 300 of the Penal Code. The provocation must be grave and sudden and D this was a question of fact in each individual case. The test of whether provocation exists was to be judged by the standard of a reasonable man. That being the case, in the assessment of the reasonableness of the accused's action, it had to be considered as of necessity whether a reasonable man would be so provoked to act as the deceased did. E Cumulatively taken, the acts relied upon to show evidence of provocation on the part of the accused were that the deceased had uttered certain words which had the effect of belittling and challenging the position, authority and seniority of the accused in the company. If this was done in front of other colleagues, it was reasonable to assume that the accused would have had a case for saying that he had 'lost face' F and had been so affected by the shame of the deceased's mockery so as to cause him to act as he did. However, the words were uttered only in the presence of the accused. The manner in which the accused reacted to the verbal insults of the deceased was not the reaction of a reasonable man under the circumstances and the provocation given by the deceased G as alleged was neither grave nor sudden in nature. (paras 89, 96, 102 & 104)

(8) It was highly unlikely that the cable was used by the deceased to cause the provocation. On the contrary, the evidence of SP11 showed that the abrasions suffered by the deceased on his arm could have been caused H by blunt force trauma. The chemist report showed that the blood found on the cable was that of the deceased. This leaned towards the inference that it was more probable that the cable was used by the accused to hit the deceased and not the other way round. Further, the act of the accused in stabbing the deceased was out of all proportion to the provocation I given by the deceased. If the accused was afraid that the cable would hit his head, he could have, in the first instance, moved away from the deceased or could have just pushed the deceased aside. The deceased's rib bones were cut right through which could only be achieved by using

more than moderate force. The accused, as such, failed on a balance of probability to bring himself within exception 1 to s. 300 of the Penal Code, *ie*, provocation. (paras 105 & 106)

(9) According to SP11's evidence and the post-mortem report, there were five stab wounds inflicted on the deceased, two of which were proved to be fatal. It was also testified that there was no defence wounds found on the deceased which indicated that he was not in a position to defend himself from the attack of the accused. The reaction from the accused indicated that he had taken undue advantage and acted in a cruel and unusual manner. Under the circumstances, the accused failed on a balance of probabilities to bring himself within exception 4 to s. 300 of the Penal Code, *ie*, that of sudden fight (*Sainal Abidin Mading v. PP*; refd). (paras 110 & 111)

(10) In spite of the accused's testimony, there was no impending peril to his life or of great bodily harm when the deceased swung the cable over the accused's head. It would not be reasonable for the accused to say that he feared the cable would cause his death if it had hit his head. The only blood found on the cable was that of the deceased. Further, the accused, being taller and bigger in size, could have either pushed the deceased or have taken flight from the scene. The number of stab wounds inflicted upon the deceased was not proportionate in the circumstances of the case as the deceased was not armed with any weapon. Even if one were to accept that the deceased swung the cable over the accused's head, the manner of retaliation by using such a weapon and aiming for the vital organs of the deceased was out of all proportion in the circumstances. Thus, the accused failed on a balance of probabilities to show that he was entitled to rely on the exception of self defence. (paras 115-117)

Case(s) referred to:

Abdul Aziz Mohamed Shariff v. PP [2010] 5 CLJ 733 FC ***(refd)***
Abdul Rashid v. PP [1994] 1 SLR 119 ***(refd)***
Anandagoda v. The Queen [1962] 1 WLR 823 ***(refd)***
Anandagoda v. The Queen [1962] 1 LNS 7 PC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bangkong Puan v. PP [2012] 1 LNS 950 CA ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
Ho Sek Kong v. PP [2011] 6 CLJ 522 CA ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Lemanit v. PP [1965] 1 LNS 89 FC ***(refd)***
Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mahmood v. State AIR 1961 All 538 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***

Mohd Fazli Azri Jamil lwn. PP [2013] 1 LNS 1237 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Poh Weng Nam v. PP & Another Appeal [2013] 4 CLJ 1096 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***
PP lwn. KK [2007] 6 CLJ 367 HC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 8 CLJ 893 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Tan Sri Kasitah Gaddam [2009] 1 LNS 741 HC ***(refd)***
PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***
Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***
R v. Duffy [1949] 1 All ER 932 ***(refd)***
Rajinder v. State (1955) 5 SCC 187 ***(refd)***
Rikky Purba v. PP [2014] 3 CLJ 607 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***
Tan Buck Tee v. PP [1961] 1 LNS 130 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Virsa Singh v. State of Punjab AIR [1991] SC 467 ***(refd)***
Zamzuri Nazari v. PP [1995] 4 CLJ 540 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 173(f), 180(4), 182A
Evidence Act 1950, ss. 17(1), (2), 24, 105, 114(g)
Penal Code, ss. 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 299, 300(c), 302

Other source(s) referred to:
Dr Sri Hari Singh Gour's Penal; Law of India, vol 3 (Law Publishers (India) Pvt Ltd, 11th Ed Revised, 2011, p 2498
Mallal's Criminal Procedure, 7th edn, pp 393 & 394

For the prosecution - Faten Hadni Khairuddin; DPP
For the accused - Lai Chee Hoe (Lim Chi Chau with him); M/s Chee Hoe & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Collin Lawrence Sequerah JC:

Prelude

[1] As the day unfolded around 10.30am on the 6 July 2011, a life brimming just moments before with vibrance and all the promise of youthful exuberance and in the very prime of its existence was needlessly extinguished in the premises at Kilang Press Metal Berhad at Klang in a most brutal fashion. The prosecution in its opening statement, pointed in no uncertain

terms to the accused as being the perpetrator of this gruesome crime. The defence would introduce the possibility of perhaps another also being present at the scene of the crime and having an opportunity, *albeit* a fleeting one, to seize the moment and inflict what would turn out to be the fatal stab wounds upon the hapless would be deceased, only to disappear the very next moment cleverly and deftly avoiding detection in a manner reminiscent of a modern day Scarlett Pimpernel. Alternatively, the defence would contend that the circumstances of what took place would resolve itself into an offence of a lesser culpability and would in the event, also place reliance upon certain exceptions in the Penal Code that would, if successful, have the effect of reducing the charge to that of culpable homicide not amounting to murder. The unfolding of this unfortunate episode begins as it must, with the preferring of the charge against the accused.

The Charge Against The Accused

[2] The charge against the accused read as follows:

> That you on 6/7/2011 at around 10.30 am at the Maintenance Store, Kilang Press Metal Bhd, Lot 6464,Batu 5 ¾ Jalan Kapar, Bukit Raja, in the district of Klang, in the state of Selangor Darul Ehsan did commit murder by causing the death of Loo Lee Keng (No. KP:861107-43-6387), and you have thereby committed an offence punishable under Section 302 Penal Code.

Prosecution Evidence

[3] The evidence as adduced by the prosecution witnesses disclose that at the material time and date of the alleged murder as stated in the charge above, both Loo Lee Keng (the deceased) and Fang Jinz Hong (the accused) were workers of the Kilang Press Metal Bhd (the factory) and both were on duty at the factory that day.

SP1

[4] To unfold the narrative upon which the prosecution had based its case, it called as its first witness, Corporal Appa Rao a/l Sinanchalam, SP1. He testified that on 6 July 2011 at about 11am he was on duty at the Bilik Gerakan, IPD Klang Utara. At around 11.02am he received a telephone call from the Pusat Perubatan Sri Kota from a staff nurse by the name of Siti who informed him that a male Chinese by the name of Loo had passed away on the way to hospital. SP1 then said that he received another telephone call from Mr Ho from Kilang Press Metal Sdn Bhd informing him that there was a fight that took place at the premises and that someone was sent to the hospital. After getting in touch with the Timbalan KPD and the S.I.O, SP1 lodged a police report, Bukit Raja Report 3660/11 which was tendered in evidence and marked as exh. P5.

SP2

[5] The next witness was Loo Heong Geok, SP2, who is the sister of the deceased. She testified that on 6 July 2011 at a little past 10am she received a telephone call from her brother's colleague, Wee Beng Kim who informed her that her brother, Loo Lee Keng, was lying down, bleeding and unable to open his eyes. Wee Beng Kim then told her that they were at the office premises at Kilang Press Metal Sdn Bhd and that he was going to send her brother to the Pusat Perubatan Sri Kota. SP2 then called her father and told him that there was an accident involving Loo and that he was taken to the hospital. SP2 then testified that she and her father went to the hospital and saw her brother. She testified that her brother was lying on a bed and that he appeared to have passed away. SP2 was informed that her brother, now deceased, was to be sent to the Hospital Tengku Ampuan Rahimah (HTAR) for a post mortem. SP2 then said that she went with her family the next day to HTAR where the post-mortem was performed. She said that her father identified the deceased. SP2 testified further that she was informed by Wee Beng Kim that a Chinese national had stabbed the deceased.SP2 said that she was aware that the deceased had a colleague who was a Chinese national by the name of Fang Jin Zhong, the accused. Under cross-examination, she said that the deceased was one of her two brothers and was an engineer at his workplace. She said that the accused was the deceased's mentor and that the accused had worked at Kilang Press Metal Sdn Bhd for ten years. She said that before the day of the incident there were no quarrels between them and that the deceased had no quarrels with anyone at his workplace. She had heard her brother talk about the accused but they were just work related matters. SP2 also testified under cross-examination that the accused had sometimes brought back gifts from China for the deceased and that their relationship was good. She said that before starting work the deceased had studied electrical engineering at Universiti Tengku Abdul Rahman (UTAR), Wangsa Maju, and while there he had never been involved in any fights with anyone. The deceased was not a hot-tempered person and did not go out much. SP2 agreed under cross-examination that the factory at the workplace was huge and that it was an aluminium factory. She said she only went there once and she could not say whether the factory was noisy. She said she went there two weeks or one month after the incident because the company had requested some documents relating to SOCSO and insurance. She also agreed that the factory area was strewn with tools. She further agreed in cross-examination that the deceased had a colleague by the name of David and that he had mentioned him to her before. She had met David after the incident but not before that.

SP3

[6] ASP Chua Hang Loun, SP3, who was attached to the IPD Klang Utara testified that he made an arrest on a Chinese national at the Press Metal Factory in Klang on 6 July 2011 and in court he identified the accused as the person he arrested that day. He said that the arrest was made at the office

of Low Kwong Fei, SP4, who had informed him that there was an incident and that someone had gotten hurt. SP3 showed his authority card, identified himself as a police and effected the arrest on the accused. He noticed an injury to left elbow of the accused at the time. He brought the accused to HTAR. While on the way he received a telephone call informing him that the person who was injured in the incident had passed away at the Pusat Perubatan Sri Kota. SP3 then lodged a police report regarding the arrest. He brought the accused to hospital after he made the report. The injury to the accused he said, was a slice with a sharp object and it was not a serious injury. He said the accused looked normal and there were no other visible injuries. While under cross-examination, he said that when he arrived at the factory premises the accused was standing in SP4's office and was not tied up. He handcuffed the accused and met with no resistance from him. SP3 said he spoke to the accused and asked him about what had happened and that he was cooperative in answering his questions.

SP4

[7] The prosecution also led evidence from SP4, Low Kwong Fei, who was the Human Resource and Administration Manager at the factory who testified that on 6 July 2011 at about 10.30am the accused came into his office and said to him in Mandarin, "You handle, I will follow your instruction". SP4 then asked the accused what had happened and the accused replied that he had an argument with the deceased over some missing spare parts which the deceased had alleged he had taken. He said that they then went into the store to look for the spare parts. SP4 then asked the accused whether he had had a fight with the deceased to which the accused replied in the affirmative. After the deceased was sent to the hospital, SP4 said that he spoke to the accused and the accused told him that three of them went to look for spare parts. He said the accused then told him that he injured the victim (deceased) during an argument. He said that he stabbed the deceased three times, twice at the stomach and one time behind the body at the back. SP4 also said that he noticed an injury to the left elbow of the accused but said that it did not appear to be a serious injury and that his reaction was normal. SP4 said that otherwise the accused just sat there and remained silent until the police arrived and arrested him. SP4 further testified that from his room he could see the deceased lying on the floor outside before being taken to hospital.

SP5 And SP6

[8] SP5 and SP6 were photographers who were instructed to take photographs of the post-mortem and the factory where the incident took place respectively.

SP7

[9] The prosecution called Than Zaw Win, SP7, a Myanmar national who was also an employee at the factory as a witness. He testified that around 10am on 6 July 2011, while he was working at his work station he heard a loud voice coming from the direction of a store room at the factory premises. He thought at the time that some of his colleagues were joking or teasing each other. He described the sound as someone saying "ah, ah, ah". He then heard the same sound being uttered ie, "ah, ah, ah" only this time a little louder. That caused him to think that something had happened. At that juncture he left his work station and proceeded to the store room. He then said that he saw the deceased bleeding around the stomach region and sitting on the floor with his legs crossed. The accused was standing immediately behind the deceased. He did not see the accused holding anything in his hand at that time.SP7 also testified that he did not see anyone else in the room at the time. He then left the store room to look for someone in order to get some help. SP7 said that he found two managers, Ah Yu and Ah Pon who were at the cooling tower at the time and told them that the accused and the deceased were fighting. Upon hearing this, both managers went into the store room. He then told some of his colleagues who happened to be passing by what had happened and then he went back to his work station.SP7 said that a lot of people then went into the store room and he saw two of them carry the deceased out of the store room.

SP8

[10] The prosecution then called Lance Corporal Roslinda binti Hamid, SP8, who was attached to the crime division at IPD Bandar Baru Klang and who testified that on 13 July 2011 she was instructed by Inspector Azizi, SP12, to send some exhibits to the chemist department. SP8 was shown chemist department receipt (Jabatan Kimia Resit) F 9698/11 dated 13 July 2011 which she acknowledged contained a list of exhibits she sent to the chemist department. After the exhibits were delivered by her she was given a receipt acknowledging the receipt of the exhibits. The prosecution informed the court that they were unable to call the chemist, Dr Norhaliza as she is in the United Kingdom and applied to have the receipt marked as P. The defence had no objections to this and the receipt was accordingly marked as P13. SP8 testified that based on the receipt there were altogether 11 items related to Bukit Raja Police Report no. 3660/11. SP8 also testified that when she sent the exhibits they were in a plastic bag and the seals were in good condition. She said that she handed the exhibits over to the chemist, Dr Norhaliza herself. On the same day she sent some exhibits to the toxicology department. She identified the Jabatan Kimia receipt no. F9699/11.

SP9

[11] SP9, Detective Corporal Intan Suzana binti Abu Bakar, testified that on 27 February 2012 she met a chemist named Norhaliza Hassan from the Jabatan Kimia Malaysia and received from her some exhibits (PJ)FOR8903/11-0 dated 21 December 2011, and a chemist report, exh. P17, which she duly handed over to SP12, ASP Azizi bin Mohd Yunus on 27 February 2012.

SP10

[12] SP10, ASP Ooi Chew Peng who was attached to the Forensics Department IPK Selangor testified that on 6 July 2011 at about 11.30am while he was on duty, he received a call to investigate a case at a factory in Klang by the name of Press Metal Bhd. He and his team from the forensics unit went there at about 12.30pm. At the factory, he gathered evidence and made tagging on the items recovered. The items he found were a bloodstained knife, a broken pair of spectacles, a plastic mineral water bottle, a bloodstained red metal cable and one bloodstained white piece of paper. He also took samples of blood with a swab. All the items he put in envelopes and sealed. SP10 then handed the items sealed in the envelopes to the investigating officer ASP Azizi Bin Mohd Yunus, SP12, at the scene itself. He also issued an acknowledgement form of handover of the items to SP12. In cross-examination, SP10 testified that the bloodstains were discovered in the store room of the factory. He also testified that he did not find any other object that resembled the knife or the weapon found. SP10 testified that he tried to lift fingerprints from the plastic bottle and the broken pair of spectacles but was unable to do so.

SP11

[13] The prosecution called Dr Norliza Binti Ibrahim, SP11, a pathologist who on 6 July 2011 was attached to the Tengku Ampuan Rahimah hospital in Klang. She testified that she was requested that day to perform a post-mortem on a deceased male by the name of Loo Lee Keng. The findings of her post-mortem are contained in a report tendered and marked as exh. P10. Her testimony revealed that there were both external and internal injuries to the deceased. SP11 testified that there were a total of five stab wounds inflicted upon the deceased. Of the five stab wounds, three were inflicted on the chest and 2 were at the back. She testified further that two of those wounds namely, wounds No. 4 and No. 5 as described in P10, were the fatal wounds to the deceased. SP11 testified that the stab wounds to the chest area were inflicted using an instrument that had one sharp side while the other side was blunt. More will be said about the testimony of SP11 in the later course of the judgment.

SP12

[14] SP12, ASP Azizi Mohd Yunus, was the investigation officer of the case. He testified that on 6 July 2011 he was informed through a telephone call of an incident at the Kilang Press Metal Sdn Bhd factory. He visited the factory that day and drew up a sketch plan tendered and marked as exh. P11. Shortly after that he testified that the forensics team lead by SP10 ASP Ooi Chew Peng arrived. At the time he arrived at the factory he said that the deceased was taken to hospital. After the arrival of the forensics team, he said he handed over the scene of the crime to them. He said that the forensics team recovered six items from the scene which they handed over to him. SP12 then conducted an intelligence recovery session with the workers in the factory. The six items recovered and handed over to him by the forensics were placed in an envelope and sealed with the forensic department stickers in front of him by SP10. The relevant items have already been described in the evidence of SP10 above. After conducting the investigation at the scene he returned to IPD Polis Klang Utara where he kept the exhibits in a cabinet in his room. He testified that both the cabinet and his room were always kept locked. He then said that the accused was also handed over to him by SP10. He identified the accused in court as the person handed over to him by SP10. SP12 then testified that on the same day he went to the hospital where the post-mortem was being performed by SP11. Before the post-mortem was conducted, he instructed SP5 Corporal Johari to take some photographs which he identified as those contained in exh. P6. After the post-mortem, he received five items from SP11 and placed his signature on the Borang Penyerahan Specimen Forensik marked as exh. P31. These items were placed in a sealed plastic container. He was referred to exhs. P27 to P30 which were four envelopes containing the exhibits he received from SP11 and which he duly identified. These exhibits along with some others he received, *inter alia*, some clothing as stated in exh. P31, he kept in his room at his office and in a locked cabinet. On 13 July 2011 he instructed SP9, WPC Lance Corporal Intan Suzana binti Abu Bakar to send the exhibits to the Jabatan Kimia Malaysia at Petaling Jaya. He said he also handed to her exh. P14 containing the list of the exhibits. He said he instructed SP9 to go to the Jabatan Kimia and collect back the exhibits. He then testified that he received a report of the results of the analysis of the exhibits from the Jabatan Kimia tendered and marked as exh. P17. He also received a DNA report on 27 February 2011. SP12 then testified that according to the results of his investigation, a person by the name of David was not a material witness and he did not record a statement from him.

Duty Of The Court At The End Of Prosecution Case

[15] At the end of the prosecution case and having outlined the evidence of the witnesses for the prosecution above, it is apposite for this court to remind itself as to its duty at this stage of the case. The statutory duty upon a trial court at the end of the case for the prosecution is as stated in s. 180

and s. 173(f) of the Criminal Procedure Code (CPC). Both sections are set out in similar terms. It states that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. Sub-section 4 of s. 180 states, "for the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction".

Prima Facie Case And The Maximum Evaluation Test

[16] The phrase "*prima facie*" in s. 180 has not been statutorily defined. However, it has been the subject of judicial consideration and pronouncement. In the case of *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1, it was held as follows:

> The meaning of *prima facie* case in s 180(1) of the Criminal Procedure Code must be understood in the context of a non jury trial. A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proved beyond reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) ... thus, a *prima facie* case as prescribed by the new s. 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

[17] With regard as to what amounts to credible evidence in order to make out a *prima facie* case, Vincent Ng J (as he then was) in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678, held as follows:

> What then constitutes a '*prima facie* case'? *Prima facie* means on the face of it or at first glance. To me, in the light of the Amendment Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the *Oxford Companion of Law* (pg 987) which has it as:
>
> > A case which is sufficient to call for an answer. While *prima facie* evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive. "It would follow that there should be credible evidence on each and every essential

A ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected".

[18] In the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] B 2 AMR 89, His Lordship Gopal Sri Ram JCA (as he then was) in his usual lucid style put it in this fashion:

> In our respectful view the correct test to be applied in determining whether a *prima facie* case has been made out under section 180 of the Criminal Procedure Code (and this would apply to a trial under s 173 of the Code) C is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721; [1983] 2 MLJ 232 at 270:
>
> > To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not D been established against Nordin Johan and Abdul Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do so even though they are being tried under Emergency Regulations) the question is can they be convicted of the offence E of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative.
>
> We are confident in the view we have just expressed because we find nothing in the amended s 180 of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative F intention of Parliament as expressed in the language employed by it to show that there would be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v. PP* [1985] 1 LNS 99; [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and the when G the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.
>
> It therefore follows that there is only one exercise that that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum H evaluation and to ask himself the question: If I decide to call upon the accused to enter his defence and he remains silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

I **[19]** In *Balachandran v. PP* [2005] 1 CLJ 85 Augustine Paul JCA (as he then was) held:

A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase "*prima facie* case" is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, 11th Edn as:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A *prima facie* case then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence has been established.

[20] The phrase "*prima facie*" has also been very admirably put in succinct terms in the case of *PP v. Tan Sri Kasitah Gaddam* [2009] 1 LNS 741; [2009] 5 AMR 228 as follows:

A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence … A maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence (see *Abdullah Zawawi v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16) and if the evidence admits of two or more inferences (see *Kasmin b Soeb v. PP* [1974] 1 MLJ 230 and *Abdullah Zawawi Yusoff v. PP* [1993] 2 AMR 2121; [1993] 4 CLJ 1), then the inference that is most favourable to the accused shall be drawn.

[21] A useful summing up of the phrase "*prima facie*" as distilled from case law is given in *Mallal's Criminal Procedure*, Seventh Edition, Lexis Nexis Malaysia Sdn Bhd pp. 393 & 394 where it is stated:

> The prosecution is said to have a *prima facie* case when the evidence in their favour is sufficiently strong for the accused to be called on to answer it. A *prima facie* case is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side. A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it would be sufficient to induce the court to believe in the existence of facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. A *prima facie* case as prescribed by section 180 of the CPC as amended means a case which if unrebutted would warrant a conviction.

[22] In the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 the Federal Court summarised the steps to be undertaken by a trial court at the end of the prosecution's case in the following terms:

> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that evidence is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a
>
> (iii) *prima facie* case has not been made out and the accused should be acquitted;
>
> (iv) after the defence is called, the accused elects to remain silent, then convict;
>
> (v) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] MLJ 263.

[23] From a distillation of the above mentioned authorities, it is therefore the duty of a trial court at the conclusion of the close of the case for the prosecution to undertake a maximum evaluation of the evidence of the witnesses for the prosecution. This involves the scrutiny of their evidence with a critical eye. Their evidence is not to be taken at face value. This evaluation also involves an assessment of the credibility of their evidence as tested against the circumstances of the case as a whole. It would involve an

assessment of whether there exists any contradiction between the evidence of each witness. Should more than one inference arise out of the evidence given, the inference favourable to the accused must be adopted. After the process of maximum evaluation is undertaken, the question must be asked, "if I call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence as it now stands". If the answer to that question is yes, then, a *prima facie* case is made out but not if it is otherwise. With the above well established principles firmly etched in the forefront of the mind of this court, the process of assessment and evaluation of the witnesses for the prosecution was consequently undertaken.

The Difference Between Culpable Homicide And Murder

[24] The charge against the accused was for murder under s. 302 of the Penal Code. Section 302 prescribes the punishment for whoever commits murder. Murder is defined in s. 300 of the Penal Code. However, it is important at the outset to distinguish between the offence of culpable homicide under s. 299 and murder under s. 300. This is because all murder is culpable homicide but not all culpable homicide is necessarily murder. It is therefore imperative for the court to appreciate the fine but discernible difference between the two in order to make the correct finding as to whether or not the evidence disclosed reflects the offence of culpable homicide not amounting to murder or culpable homicide amounting to murder.

[25] Section 299 of the Penal Code defines the offence of culpable homicide as follows:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[26] Section 300 of the Penal Code describes murder in the following terms:

> Except in the cases hereinafter excepted culpable homicide is murder:
>
> (a) If the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any

A excuse for incurring the risk of causing death, or such injury as aforesaid. Section 300 goes on to set out a number of exceptions which operate to reduce murder to culpable homicide not amounting to murder. These exceptions are provocation, exceeding private defence, exceeding the powers of a public servant, sudden
B fight and consent.

[27] From a perusal of both ss. 299 and 300, it is clear that some cases of culpable homicide will amount to murder while some will be classified as culpable homicide not amounting to murder.

C **[28]** Because of the similarity in wording, the distinction between the two is so fine as to be almost indiscernible. This court is therefore grateful for the assistance of high authority that has flowed from the ink of the pens of some of the most distinguished legal minds in this country.

[29] In the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977]
D 1 MLJ 174, Raja Azlan Shah J (as His Highness was then) held as follows:

> ... A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by
E reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder ... but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient
F to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling under section 300 Penal Code must necessarily fall within section 299, but all cases falling within
G section 299 do not necessarily fall under section 300 ...

[30] The case of *PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893 further clarified the position when it quoted *verbatim* the case of *Tham Kai Yau* (*supra*) some part of which bears necessary repetition as follows:

H The basic issue therefore is on the difference between ss. 299 and 300 of the Penal Code. In our view the difference is thin but detectable. The difference is in the degree of probability or likelihood of causing death. This is what was said in *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 at p. 176:

> I Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that ... the act is likely to cause death.

Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... is sufficient in the ordinary course of nature to cause death;

(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also

A cases which fall within the second part of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

Thus, if death is an imminent result, it falls under s. 300. If on the other
B hand, that death is a likely result, it falls under s. 299. It would be safe to conclude that all cases under s. 300 would fall under s. 299 as well, but this is not necessarily so *vice versa*.

[31] The case of *Poh Weng Nam v. PP & Another Appeal* [2013] 4 CLJ 1096 also alluded to the *dicta* in the *Tham Kai Yau*'s case in explaining the
C difference between culpable homicide and murder. Further elucidation as to the difference between culpable homicide and murder was forthcoming in the case of *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364 in the following fashion:

It is well settled that the nature of injury as well as the mode to cause
D the injury as well as the force used to cause the injury will be a determining factor for the court to determine whether s. 300 will or will not apply. For example, (i) if a person just slaps the victim and the victim dies, it may not attract s. 300. However, if repeated slapping has caused the death it is likely to attract s. 300. (iii) If death is caused by attacking brutally with a knife or attacking with firearms it will attract s. 300. There
E is abundance of literature in this area of jurisprudence. The legal manner of analysing murder and culpable homicide not amounting to murder is well articulated in the Indian Supreme Court case of *Kesar Singh v. State of Haryana* [2009] 3 SCC 1193. Two passages from the learned author Nandi on *Criminal Ready Referencer* 3rd edn. 2012 in our view will stand as a useful guide. The said paragraph at vol. 3 p. 614 reads as follows:

F

Culpable homicide

Scope

The section defines the offence of culpable homicide. The essential pre-requisite of the offence is the death of a human being by a
G human being. According to the Supreme Court decision of *Akram v. Seikh* AIR 1964 SC 1263: (1964) 2 Cr LJ 350, the causing of death of a person accompanied by intention expressed in two different ways or with the knowledge as mentioned in the section is distinguishable from cases of death resulting from rash or negligent act, or from hurt, grievous or simple. Once it is proved that the act
H was deliberate, and not the result of accident or negligence, the offence committed was culpable homicide.

If a person wilfully drives a motor car into the midst of a crowd and thereby causing death of some person, it will not be case of rash or negligent driving, but the act will amount to culpable
I homicide – *State v. Haidar Ali* AIR 1976 SC 1012: 1976 Cr LJ 732.

Where death was not proved to have been intended, neither s. 299 (1st or 2nd part), nor s. 300 would be attracted. But where there was the knowledge that the act was likely to cause death, 3rd part of s. 299 would be attracted – *Laxman v. State* AIR 1968 SC 1390.

Ingredients

Culpable homicide may be classified in three categories:

(1) in which death is caused by the doing of an act with the intention of causing death?

(2) when it is committed by causing death with the intention of causing such bodily injury as is likely to cause death; and

(3) where the death is caused by an act done with the knowledge that such act is likely to cause death.

A note of caution at this juncture must be stated. Knowledge and intention should not be confused. Section 299 in defining first two categories does not deal with the knowledge whereas it does in relation to the third category. It would also be relevant to bear in mind the import of the terms "likely" would mean probably and not possibly. When an intended injury is likely to cause death, the same would mean an injury which is sufficient in the ordinary course of nature to cause death which in turn would mean that death will be the most probable result.

The distinction between culpable homicide amounting to murder and not amounting to murder is well known. Culpable homicide is genus, murder is its specie. The culpable homicide, excluding the special characteristics of murder, would amount to culpable homicide not amounting to murder. The Code recognises three degrees of culpable homicide. When a culpable homicide is of the first degree, it comes within the purview of the definition of s. 300 and it will amount to murder. The second degree which becomes punishable in the first part of s. 304 is culpable homicide of the second degree. Then there is culpable homicide of third degree which is the least side of culpable homicide and the punishment provided for is also the lowest among the punishments for the three grades. It is punishable under the second part of sec. 304 – Kesar Singh v. State of Haryana (2009) 3 SCC (Cri) 1193.

[32] Finally, there is the fairly recent case of *Mohd Fazli Azri Jamil v. PP* [2013] 1 LNS 1237 which quoted a number of Indian authorities on the subject to the following effect:

Terdapat banyak kes yang diputuskan di Malaysia dan di bidang kuasa komanwel lain, terutamanya di India yang mempunyai peruntukan in *pari materia* dengan Malaysia, yang menerangkan perbezaan antara kesalahan bunuh ('murder') dan homisid salah yang tidak terjumlah kepada bunuh ('culpable homicide not amounting to murder'). Antara kes-kes tersebut ialah *Pendakwa Raya v. Megat Shahrizat Bin Megat Shahrur* [2011] 8 CLJ 893; *Tham Kai Yau v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174, *Poh Weng Nam v. PP & Anor Appeal* [2013] 4 CLJ 1096; *PP v. Thenegaran a/l Murugan & Another Appeal* [2013] 4 CLJ 364.

Dalam kes *State of Andhra Paradesh v. Rayavarapan & Anor* [1976] 4 SCC 382, Mahkamah Agung India telah menjelaskan perbezaan tersebut seperti berikut:

> From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of section 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of section 304, depending, respectively, on whether the second or the third Clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated in section 300, the offence would still be 'culpable homicide not mounting to murder', punishable under the First Part of section 304, Penal Code.
>
> The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so inter-twined and the second and the third stages so telescoped into each other, that it may to be convenient to give a separate treatment to the matters involved in the second and third stages.

Pandangan di dalam kes di atas telah diulangi dan dipersetujui oleh kes *Ghelabhai Jagmalbhai Bhawad & Ors vs. State of Gujarat* [2008] 17 SCC 651, apabila pemerhatian berikut dibuat:

> Murder is considered to be an aggravated form of culpable homicide and to render it a murder the case must come within the four clauses of Section 300. Consequently, it needs consideration at the threshold as to whether any of the accused has done any act by which he has caused the death of another person. Incidentally, it requires a consideration as to whether such act(s) amounted to culpable homicide, as envisaged under Section 299. If the evidence on record could evoke a positive answer in affirmation, the stage for consideration of the applicability or otherwise of Section 300 in the light of the clauses elucidating the offence as well as the exceptions engrafted therein arise. If the facts proved by the prosecution do not satisfy any one of the

clauses contained in Section 300, it would only be a case of culpable homicide not amounting to murder, punishable under Section 304, the further question as to under which part of the said provision depending upon the nature of evidence and the necessary ingredients proved to attract one or the other clauses of Section 300 is satisfied, yet if the evidence could establish that the case falls under any one of the exceptions still the offence said to have been committed would only be culpable homicide not amounting to murder punishable under Section 304 of the Penal code. Thus, culpable homicide will not also amount to murder if the case falls within any of the exceptions in Section 300 and only by such process of reasoning and elimination, a case for murder can be held proved.

[33] From a distillation of the abovementioned authorities, what it boils down to is this. The difference between ss. 299 and 300 lies in the degree of probability or likelihood that death would result from a particular act ie, the degree of risk to human life. If death is a likely result of the act, it is culpable homicide, if it is the most probable result, it is murder. If death is imminent, it is also murder. Culpable homicide may not amount to murder where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300 apply, for example provocation, right of private defence and sudden fight and where the necessary degree of *mens rea* in s. 299 is present but not the special degrees of *mens rea* referred to in s. 300 of the Penal Code.

[34] Section 300 of the Penal Code states as follows:

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[35] The circumstances of this case based on the evidence led and the factual matrix as adduced by the prosecution witnesses as alluded to above, clearly show that the prosecution's case is premised upon the accused having

done an act with the intention of causing bodily injury to the deceased, and the bodily injury intended to be inflicted was sufficient in the ordinary cause of nature to cause the death of the deceased pursuant to s. 300(c) of the Penal Code.

[36] The reasons why will be explained shortly in the course of this judgment. In this connection the *locus classicus* is the Indian decision of *Virsa Singh v. State of Punjab* AIR [1991] SC 467, where the views expressed by Vivian Bose J is widely relied upon as stating the correct law on the subject where he said as follows:

> ... To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 "thirdly" ... ;
>
> ... First, it must be established, quite objectively, that a bodily injury is present ...;
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations ...
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended ...
>
> ... Once these three elements are proved to be present, the enquiry proceeds further and Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender ...
>
> ... Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that was no intention even to cause an injury of a kind that is sufficient in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there was no knowledge that an act of that kind will be likely to cause death. Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death ...

[37] It is plain from an account of the foregoing that the prosecution must prove firstly, that the named deceased had a bodily injury present as a result of which he had died, secondly, that the deceased died as a result of the stab wounds inflicted upon him, and thirdly, that the injuries were inflicted by the accused and that the accused intended to inflict such injury and that the act was not accidental or unintentional or that some other kind of injury was intended. Fourthly, that such bodily injury was sufficient in the ordinary course of nature to cause death.

Evaluation Of Evidence Of Witnesses For The Prosecution

[38] The main evidence led by the prosecution to prove the guilt of the accused was given by SP7, Than Zaw Win. His testimony and the testimony of the other witnesses have been outlined above and need not be repeated here save in so far as is necessary for the purpose of specifically evaluating their evidence. He testified that on the morning of 6 July 2011 at about 10am while he was working in the factory at his work station, he heard some loud voices. In cross-examination he testified that while he had on his safety helmet at the time as he was working, the ear protection plugs that were attached to the helmet were hanging outside and was not in his ear. Hence his ability to hear the sounds which he said emanated from the store room which was situated about ten to 12 metres from his work station. He said that the second noise he heard which was a repetition of the first which he described as someone saying "ah, ah, ah" but only much louder than the first, prompted him to go to the store room to check what had happened. When he went into the store room he saw the deceased seated on the floor in a cross-legged position with the accused standing behind him. He said the deceased was bleeding from the stomach region at the time and that the bleeding was evident to him from the bloodstain which he described as the size of a palm in the stomach region. He said that apart from the accused and the deceased, he did not see anyone else in the store room. He also said that he did not see the accused holding anything at the time. He then left the store room to summon for help. While under cross-examination, although he was candid enough to admit that at the time he heard the sounds from the store room he would not know whether or not a worker by the name of David was in the room or not, he was steadfast in his testimony that at the time he went in the store room he did not see anyone else besides the accused and the deceased. While under cross-examination he also candidly admitted that after he left the room he would not know what had happened in the store room. SP7 testified that after he left the store room, he saw two managers and informed them what happened and he then returned to his work station. He agreed under cross-examination that when he next saw the deceased, the deceased was being carried out by some workers and that the appearance of the deceased had changed compared to the time he had first seen him in the store room. SP7 came across as an honest witness who was merely describing the events as he saw it. When asked about the possibility of someone else being in the room he was honest enough to admit that he would not know whether someone else was in the store room before he went in or after he left the room. However he was sure that at the time he first went in the store room, all he saw were the deceased and the accused. It was not suggested to SP7 that he had a bone to pick with the accused or that he was favouring the version of the prosecution for any reason whatsoever and neither did his demeanour suggest that he appeared evasive or in any manner to suggest that he might not be quite telling the truth. It is the courts finding therefore that the testimony of SP7 was that of a credible witness whose evidence was capable of belief.

[39] SP4, Low Kwong Fei, was the Human Resource and Administration Manager of the company where the factory was located. As already referred to above, he testified as to what the accused had told him at about 10.30am on 6 July 2011 when he came into SP4's office. SP4 testified that the accused came in, sat down in front of him and told him in Mandarin "you handle, I will follow your instruction". SP4 then testified that he was informed that there was an incident and that someone in the factory was seriously injured as a result. SP4 said that from his office he could see the deceased being carried out. SP4 then asked the accused what happened and the accused told him that while he, the deceased and another person were looking for some spare parts for a machine, an argument ensued between him and the deceased. As a result of the argument, the accused told SP4 that he stabbed the deceased twice in the stomach and once behind. The accused was not requested nor invited by anyone to go over to the Human Resource Department and meet with SP4. He went voluntarily and of his own accord to see SP4 and there was no evidence nor was it suggested that the accused was under any compulsion to see SP4 about the incident. SP4 had occasion to witness the chaos from the aftermath of the incident from his room. He asked the accused what had happened and the accused, without any hesitation, told him what had happened. The accused was also not placed under any restraint at the time. SP4 also did not know what was the condition of the deceased at the time the accused was with him. SP4 was not the immediate superior of the accused person as the accused's immediate superior was the Facility and Maintenance Manager so SP4 was not a "person in authority". Under the circumstances, this court finds that the statements made to SP4 are not caught by the prohibitory provisions of s. 24 of the Evidence Act 1950.

[40] This court finds that the words uttered by the accused to SP4 alone, without reference to any extrinsic factors that may have prevailed at the time, that he had stabbed the deceased as a result of an argument and him consequently telling SP4 to handle it and that he would follow whatever was decided, amounts to a confession under s. 17 of the Evidence Act 1950.

[41] Section 17(1) of the Evidence Act 1950 states that an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned. Section 17(2) states that a confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence. I am fortified in my view by a plethora of case law that have enunciated the principle that a statement will amount to a confession if the accused confesses to the elements of an offence. See *Anandagoda v. The Queen* [1962] 1 LNS 7; [1962] MLJ 289; *Lemanit v. PP* [1965] 1 LNS 89; [1965] 2 MLJ 26; *Zamzuri Nazari v. PP* [1995] 4 CLJ 540; and *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537(CA).

[42] In *Anandagoda v. The Queen* [1962] 1 WLR 823, Lord Guest speaking for the Board said:

> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection Their Lordships consider that the view expressed by Gratiaen J. in *Seyadu v. King*, the test of whether an 'admission' amounts to a 'confession' within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is relevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession although the accused at the same time protests his innocence.

[43] The case of *Ho Sek Kong v. PP* [2011] 6 CLJ 522; [2011] 5 MLJ was an appeal by the accused who faced a charge under s. 302 of the Penal Code for the murder of his mother and was convicted by the High Court. The prosecution's case against the accused rested on the evidence of the accused sister's boyfriend named Wan. The evidence led disclosed that the accused had told Wan that he did it but had not intended to do it (dia yang buat tapi tak ada niat nak buat). The Court of Appeal was of the view that this piece of evidence was pivotal in the determination of the guilt or innocence of the accused. They then held that the trial judge had rightly admitted that statement as a confession under s. 17(2) of the Evidence Act 1950. The appeal of the accused was accordingly dismissed.

[44] In *PP lwn. KK* [2007] 6 CLJ 367, the accused child's statement by telephone to his tuition teacher "sorry teacher, teacher sorry, sorry teacher, I don't know why I did it" was held to be a confession under s. 17(2) of the Evidence Act 1950. The decision was upheld by the Federal Court in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1. In *Lemanit v. PP* [1965] 1 LNS 89; [1965] 2 MLJ 26 (FC) the accused admitted exploding a bomb at a place in Singapore. The court held that taken as a whole without reference to extrinsic facts, the statement was an admission suggesting the inference that he committed the offence for which her had been arrested and subsequently charged. In the case of *Abdul Rashid v. PP* [1994] 1 SLR 119 it was held at p. 129:

> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested

A the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts.

The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or
B substantially admit guilt or do they taken together in the context inferentially admit guilt? ... We need only add that, for a statement to amount to a confession, it need not be of a plenary or unqualified nature and can also be of a non-plenary nature, so long as the statement connects the accused in some way with the offence.

C **[45]** The credibility of SP4 as a witness in this respect or at all was also not seriously challenged and his testimony as a credible witness therefore holds intact. There was no suggestion that he had any axe to grind with the accused or that he was an interested witness with any vested interest in giving such evidence against the accused. Indeed, SP4 was not challenged at all as to the words uttered to him by the accused. Therefore as stated earlier, this
D court finds that the statement of the accused to SP4 was admissible as a confession under s. 17(2) of the Evidence Act 1950.

[46] The other vital piece of evidence comes from the testimony of SP11, the pathologist. As stated before, the deceased suffered five stab wounds. She
E testified that the injuries inflicted were consistent with them being inflicted with by a weapon which was pointed and had one sharp edge on one side and one blunt edge on the other. She said that the object could have been a knife with one sharp edged side. The width of the stab wounds, she said were 2.8 to 3cm. The deepest wound was 12cm. The fatal stab wounds, she said, were injuries number 4 and injury number 5 to the chest. These injuries had cut
F the pericardium and severed the aorta and the pulmonary artery leading to the right ventricle to the heart. Both the right and left lungs also suffered damage as a result. When referred to the photographs in exh. P6, in particular photograph no. 33, she said it showed the second left side ribs cut through, the third right rib cut through and also part of the sternum, and the
G sixth and seventh left side ribs cut through.

[47] From the foregoing, can it be said that the prosecution has proved all the ingredients of the offence to the satisfaction of the maximum evaluation test? The prosecution in a charge for murder under s. 300 must prove the following ingredients namely, that the deceased named in the charge had
H died, secondly, that the deceased died from the injuries inflicted upon him, thirdly, that the injuries were inflicted by the accused and that the injuries inflicted were sufficient to cause death in the ordinary course of nature.

[48] The first ingredient to be proved is that the deceased named in the
I charge had died. This was adequately proven by the evidence of SP2 Loo Heong Geok who was the sister of the deceased and who tearfully identified the deceased from the photographs shown to her as that of her brother. SP4 likewise confirmed the death of the decease and SP11, the pathologist, also confirmed the demise of the deceased.

[49] With regard to the fact that the deceased died of the injuries inflicted upon him, SP11 testified that the deceased had died of the wounds caused by the infliction of stabs wounds to the chest which were injury no. 4 and no. 5 and which penetrated into the heart and lung. SP11 also testified that given the fact that the rib bone had been cut right through, more than moderate force would have had to be used. The testimony of SP11 clearly showed that the injuries inflicted, namely wounds no. 4 and no. 5, were sufficient in the ordinary course of nature to cause the death of the deceased and did in fact so cause the death of the deceased here.

[50] The fact that the injuries were inflicted by the accused was sufficiently proven by the evidence of SP7, the worker from Myanmar who had heard noises coming from the store room at the factory and upon entering said that he saw only the deceased and the accused in the room. He said that the accused was standing behind the deceased who was sitting in a cross legged position on the floor and was bleeding. This piece of evidence shows that the accused was last seen with the deceased before the demise of the deceased. The only reasonable inference from that was that it was none other than the accused who had inflicted the stab wounds to the deceased. The evidence of SP4 also as alluded to earlier, regarding the confession of the accused made to him further fortifies the view that it was the accused who had inflicted the fatal wounds to the deceased.

[51] The evidence disclosed that the weapon used by the accused to inflict the injuries upon the deceased was pointed and had a sharp edge on one side. The evidence of SP11 showed that the fatal wounds were directed towards a vital organ of the deceased, namely the heart and lungs. From the nature of the weapon used and the vital organs that were targeted, there was present the necessary degree of *mens rea* required for s. 300 in that the death of the deceased was, given the circumstances, the most probable result. In the case of *Tan Buck Tee v. PP* [1961] 1 LNS 130; [1961] 1 MLJ 176, it was observed as follows:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

[52] Also from the nature of the wounds inflicted and the weapon used, it ruled out the act being of an unintentional or accidental nature and from the evidence of SP11, it is clear that the injuries inflicted were sufficient to cause death in the ordinary course of nature. See *Virsa Singh* (*supra*).

Circumstantial Evidence

[53] It is not in dispute that the facts adduced by the prosecution is based on circumstantial evidence. There were no eye witnesses to the incident that led to the death of the deceased. It is trite that the onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that

A evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient. See *Chang Kim Siong v. PP* [1967] 1 LNS 18.

[54] In the case of *Sunny Ang v. PP* [1965] 1 LNS 171; [1967] 2 MLJ 195, the Federal Court in approving of the directions in respect of circumstantial B evidence given by the trial judge had this to say:

> The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> C > The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - 'Was it an accident?'.
>
> D The second passage is as follows:-
>
> > Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of E them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?
>
> F
>
> > The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.

G **[55]** In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

[56] In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561, it was held as follows:

> It is trite law that where the prosecution is relying on circumstantial H evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient (per Pike CJ in *Chang Kim Siong v. PP*).

[57] In respect of the burden of proof that rests upon the prosecution where a case is based on circumstantial evidence, the case of *Jayaraman Velayuthan* I *& Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; [1982] 2 MLJ 273 held as follows:

I am well aware that the "irresistible" formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *McGreevy v. Director of Public Prosecutions* [1973] 1 WLR 276; [1973] 1 All ER 503 where it was argued, at p. 279, before the House of Lords that "in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused".

[58] In *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, the Federal Court in very succinct terms reviewed the authorities on circumstantial evidence and observed as follows:

The law on circumstantial evidence, in our opinion, is well settled. There are numerous decisions by the courts in our country as well as other jurisdictions which deal with circumstantial evidence.

[10] The mode of evaluating circumstantial evidence has been stated by the Supreme Court of India in *Hanumant Govind Nargundkar and another v. State of Madhya* Pradesh AIR [1952] SC 343 as follows:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

[11] Again, in *Chandmal & Anor v. State of Rajasthan* AIR [1970] SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:

It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt (see also *Gambhir v. State of Maharashtra* AIR 1982 SC 1157).

A [12] In *Kishore Chand v. State of Himachal Pradesh* AIR [1990] SC 2140, the Supreme Court of India was again confronted with the issue of circumstantial evidence and speaking through K Ramaswamy J it held that: The entire prosecution case rested on circumstantial evidence ...

The question, therefore, is whether the prosecution proved guilt of the
B appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. ... The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt.

C
... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. ... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the
D accused is entitled to the benefit of the doubt.

... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused. ... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a
E conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

[13] Back home in *Chan Chwen Kong v. Public Prosecutor* [1962] 1 LNS 22; [1962] MLJ 307, Thomson CJ (as he then was) observed:

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... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[14] In *Karam Singh v. Public Prosecutor* [1967] 1 LNS 65; [1967] 2 MLJ 25,
G HT Ong FJ (as he then was) noted: ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

(See also *Muniandy & Anor v. Public Prosecutor* [1973] 1 LNS 92; [1973] 1 MLJ 179, *Kamis v. Public Prosecutor* [1974] 1 LNS 59; [1975] 1 MLJ 46,
H *Lim Foo Yong v. Public Prosecutor* [1976] 1 LNS 62; [1976] 2 MLJ 259 and *Dato Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232).

[15] The Federal Court, in *Chang Kim Siong v. Public Prosecutor* [1967] 1 LNS 18; [1968] 1 MLJ 36 stated:

I
> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[16] In *Jayaraman & Ors v. Public Prosecutor* [1981] 1 LNS 129; [1982] 2 MLJ 273 Syed Othman FJ (as he then was) has the following to say of a judge dealing with circumstantial evidence. At p 280 of the report His Lordship opined:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Director of Public Prosecution* where it was argued at p 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are: (a) consistent with the guilt of the accused; and (b) exclude every reasonable explanation other than the guilt of the accused.

[59] Finally, for the sake of completeness, the case of *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1; [2008] 3 MLJ 161 deserves mention as most of the principles relating to circumstantial evidence were carefully and meticulously considered by our apex court in the following passage that merits reproduction in its entirety:

> Since the prosecution is relying on circumstantial evidence to prove its case it would be pertinent for me to briefly cite the relevant aspect of the law on circumstantial evidence.
>
> Circumstantial evidence is defined in no better words than in the remarks in the case of *Idris v. Public Prosecutor* [1960] 1 LNS 60; [1960] MLJ 296, which quoted Lord Cairns' in the House of Lords case of *Belhaven & Stenton Peerage* (1875-76) 1 App Cas 278 at p 279:
>
> > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
>
> The learned trial judge in *Idris v. Public Prosecutor* said:
>
> > In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test. If it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

A The Court of Appeal in the present case said (*Public Prosecutor v. Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320 at p 346):

> 3 MLJ 161 at 173
>
> Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v. Public Prosecutor* [1960] MLJ 96). Abdoolcader FJ in *Dato Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 232 at p 275 said:
>
> > Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306).

[60] Applying the above well established principles to the facts at hand, and in no way intending to repeat what has been said earlier, save for the sake of clarity of exposition, on the evidence adduced, it is not in dispute that the accused was the last person seen with the deceased just before the death of the deceased. SP7 testified that he heard sounds emanating from the store room and when he went in to look, he saw the accused standing behind the deceased who at the time was in a sitting position and bleeding in the stomach region. SP7 said he saw no one else there besides the accused and the deceased. After that he went out to get help. Under cross-examination, he said that nothing had impeded his view while in the store room and it is just that he left the store room in haste to seek help after what he saw. He was categorical that besides the accused and the deceased, there was no one else in the store room. SP7 said that the distance from the store room to the cooling tower (where he found the two managers and told them what had happened) was approximately from the position of the witness box to the door at the side of the court, which all parties in court had agreed was approximately 15 meters. SP7 said that after he came out of the store room, he found the other managers after about one or two minutes. Taking all of the above into consideration and given the normal course of human and natural events at the time, an inference can be reasonably made that it would take no more than about two or three minutes at the most from the time SP7

left the store room until the time the two managers arrived at the store room. It must also not be forgotten that the accused himself was still in the store room at the time SP7 left. It is therefore not in accord with reasonable events of probability that during that time, someone else would have gone in and inflicted stab wounds or further stab wounds on the deceased without the accused himself being able to witness such an occurrence before he left the store room and before the arrival of the two managers. Anyone who during that relatively short interval of time given the circumstances could have gone in and inflicted wounds or more wounds on the deceased must have been possessed not only with an extraordinary sense of bravado but also quickness of action and nimbleness of feet so as to avoid detection. Be that as it may, the evidence as it stands is that there were no other persons seen inside the store room at the time SP7 went in and no other person was evidently seen by the accused himself nor did the two managers who went in after being informed by SP7 of what had happened, see anyone else. There is then the evidence of SP4 who said that the accused on that fateful morning came into his room and told him, among other things that he had stabbed the accused twice in the stomach and once from behind. The evidence of SP11,the pathologist, coupled with the post-mortem report tendered and marked as exh. P10 does not disclose any stab wounds to the stomach and in any event not two of them but were in fact to the chest and to the back of the deceased. With regard to the fact that the wounds inflicted differ in position or point of entry, SP11 testified that in a scuffle both the attacker and the victim may change positions and this could account for the differing types of stab wounds on the deceased.

[61] With respect to the fact that although SP7 said when he first saw the deceased, the bloodstains on his shirt was no more than the size of a palm of the hand, SP11 testified that as a result of stab wounds no. 4 and 5, the blood may not flow or spurt out that quickly or in large quantities because it could have been blocked by other things such as the bones and the chest cavity may also accommodate the blood. This was in response to the cross-examination by the defence in an obvious reference to the fact that it may not have been the accused who had inflicted wounds no. 4 and 5 but it could have been inflicted by someone other than the accused after the accused had left the store room.

[62] Taking all of the above in totality, and considering all the circumstances of the case, the irresistible conclusion points towards no one other than the accused who had inflicted all of the stab wounds upon the deceased which caused the death of the deceased on the day and time in question. This court was therefore satisfied that the prosecution had proven the ingredients of the offence of murder under s. 300 of the Penal Code and punishable under s. 302 of the same Code.

A **Section 114(g) Evidence Act 1950**

[63] The defence submitted that as the two managers by the name of Lee Hee Fhun and Ah Yew were not called to testify by the prosecution, s. 114(g) of the Evidence Act 1950 ought to be invoked against them. The importance of both these persons according to the defence, lies in the fact that after SP7 informed them as to what had happened, both of them rushed to the store room and thus they would be in a position to testify as to the physical condition of the deceased at the time. The importance of this, contends the defence, is that SP7 testified that at the time he saw the deceased in the store room he was able to identify him as the deceased wore spectacles and that he said that the spectacles were in good condition at the time. However, SP7 testified that when he saw the deceased being carried out by the other workers a few moments later, his physical appearance had changed. The other reason the defence contends why the testimony of the two managers are important is that according to SP7 he was standing at the same spot where the deceased was later found lying. This, they say, points to the fact that the position of the deceased was different from the first time SP7 saw him. Therefore something could have happened after SP7 left the store room until the time the deceased was discovered by the two managers. The above contentions are readily answered by the testimony of SP11 when she testified that the abrasions to the face of the deceased could have been caused by falling face downwards onto a hard and rough surface. This was of course the floor of the store room. That would also account for the broken spectacles. As to the fact that the position of the deceased had changed from the time SP7 saw him in a seated and cross legged position, the fact that the deceased fell forward, indicative of the abrasions caused to his face, would have clearly altered his position from that of a seated one to that of a lying down position subsequently.

[64] In respect of the law that governs the application of s. 114(g) of the Evidence Act 1950, the leading authority is the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 where it was held as follows by the then Supreme Court:

> ... it is essential to appreciate the scope of section 114(g) of the Evidence Act, 1950 lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material witness to the case.

[65] For the reasons adumbrated above, this court finds that the two managers were not material witnesses to the case and therefore finds that s. 114(g) of the Evidence Act 1950 may not be invoked against the prosecution.

Decision Of Court At The End Of The Prosecution Case

[66] Bearing in mind the provisions of s. 180 of the Criminal Procedure Code as alluded to above, the principles enunciated in case law aforementioned on what constitutes a "*prima facie*" case, and having sifted through the evidence of the witnesses for the prosecution with a fine toothcomb endeavouring to leave nothing in its wake, this court then posed the following question to itself; If I now call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me?

[67] Having given the question posed serious consideration, this court found the answer to that question to be a resounding yes. Accordingly this court held that the prosecution had succeeded in making out a *prima facie* case against the accused and consequently called upon the accused to make his defence. The three alternatives of giving evidence on sworn oath, making a statement from the dock and electing to remain silent were duly explained to the accused. The accused elected to give sworn evidence on oath from the witness stand.

The Defence Case

DW1

[68] The accused, Fang Jinz Hong by way of background gave evidence that Press Metal Sdn Bhd was his first place of employment in Malaysia. He said that he had never had any disciplinary problems in the company and that his working relationships with his co-workers were cordial. He knew the deceased and testified that the deceased was under his mentorship for more than a year. He was in the same department as the deceased. The accused said that his job scope had to do with iron materials. He said the deceased's job scope was to repair machines for processing aluminium. The deceased worked in a unit with a worker named Tai Wei. Tai Wei, he said, was also known as David. David's job scope was the same as the deceased and they worked in the same department. The accused testified that in July 2011 he had financial problems which were related to the payment of his child's education fees. He said that his work burden at the time was onerous as he had to manage or repair other units also which were not within his job scope or his responsibility. He also testified that he normally worked six to eight hours a day but if a machine was spoilt he worked for 24 hours. He had to repair other machines in other units sometimes up to two to three times a week and sometimes three to four times a week. He said that although there were no deadlines to repair the machines he would try to do it as soon as possible. He said he was the only one on standby. At the time of the incident, there was a production line that he had to settle within ten days.

[69] The accused then proceeded to relate the course of events that transpired that fateful day. On the 6 July 2011 he arrived at the factory at 7am after which he had breakfast. He then went for exercise and when he

started work at 8am he went for a meeting. He said he saw one Ah Ling was not at the meeting and so he went to his unit to conduct a check on the processes at his workplace. This he said, was at 8.30am. After that someone informed him about a machine that had broken down and so he went over to repair that machine. It took him about ten to 15 minutes to repair the machine which he said was completed at around 8.40am. He then said there was another person by the name of Ah Ling also who told him to replace the light bulb in another machine. This was around 8.50am but instead of doing that he went over to another machine to repair a wire which was spoilt. He went over to that unit but that unit was closed so he could not repair that machine either. He then waited for the door to that unit to be opened after which he said he handed over the replacement wire to the person in that unit but did not repair the machine himself. After he went back to his unit he received some complaints and so he proceeded to look for some spare parts for the light bulbs for the machine. After he found the light bulb he put it on the table in the store room. At that time David and the deceased came to the store room. This was around 9.30am. The deceased asked him whether some spare parts for a machine was in the store room. The accused said he replied that that spare part was used for cooling the machine and that he did not have that spare part. That spare part was to control the temperature of the machine. After the accused told him that, the deceased said something to David. He was not sure what was said but he noticed that it was said in an angry manner. David then pointed his finger at him and said something but he was not sure what he said. At that time the accused said that he was seated and the deceased uttered the words to him "you are lying" and pointed his finger at him. The accused then told him that he does not purchase the spare parts but that the company purchases them upon his instructions. The deceased and David then faced each other and said something to each other in an angry manner but he was not sure what was it that was said as he only understood Mandarin. He saw that both their faces were red. The deceased then told the accused to open a cabinet because he wanted to check what was inside. The accused then used a key to open the padlock but the deceased opened the padlock and the cabinet door. After the cabinet was opened, the deceased searched the first rack which only had some machines. The accused then rummaged through the second rack in the cabinet which contained some documents. The accused at that point became upset and angry as those were his personal documents. At that point David showed up and said something in an angry manner but the accused did not know what he said. At the time the deceased was examining the cabinet, David was behind him and they were quarrelling with each other. The accused then testified that both David and the deceased got into a fight and the accused had to separate them. The deceased then continued to examine the same cabinet. The accused then said that the deceased then pushed away all the things in the cabinet. Some gloves and an instrument fell down as a result. The accused said that the cabinet contained a lot of things such as spare parts and when those things fell down

he was seated on a bench in the store room as shown in exh. P7 photograph 4. At that point, the accused said he was angry and had a headache. The accused testified that David was also angry and left the store room as a result of the fight he had with the deceased. When David was at the door to the store room and about to leave, the deceased shouted to him that he had to return to the store room in three minutes. The accused testified that he did not know why the accused had told David to return and thought at the time that it was because either that David needed to go to the toilet or that he left as result of the fight they had. The accused testified that the deceased's reaction towards David was not good and that the deceased had shouted at David the way a teacher would scold a pupil. He said that he did not know where David had gone to once he left the store room. The accused then testified that when David left the store room, he was left in the store room with the deceased alone. The accused then said that the things in the store room was in a messy condition with things strewn all over because of the deceased's earlier action in pushing down the things in the cabinet. The accused said that he was angry because that was his room and not the deceased's room. The accused next said that the deceased took an object that he said was an electronic spare part with metal edges at both ends and resembled a cable and started swinging it over his head. At the time the accused was still seated on the bench while the deceased was standing in front of him. He said that the deceased did that because he was angry for not being able to find the spare part he was searching for. The accused told the deceased that he had come there to mess up his room to which the deceased replied that he had come to look for some tools in the cabinet. As the deceased swung the cable like object over his head, the accused told him to stop it as he already had a problem with his child's education fees. The deceased then told the accused that he had problems with his brain as he seemed to think that he knew everything in which context he obviously meant that the accused had an ego problem or something along those lines and he pointed his finger at the accused's head while he said this. The deceased then told the accused not to try to deceive them and that what he was able to do, David was also capable of doing, obviously meaning when taken in context, that the accused was trying to portray extraordinary work capabilities when in fact what he was accomplishing was something that even David was accomplishing or capable of accomplishing. The accused said that while the deceased said these things to him, he was still swinging the cable like object over his head. The accused said that the object did not hit his head but that it did make contact with his slightly toward the back region of his left shoulder. The accused then scolded the deceased and told him that he was just the pupil and he was the master. The distance between them was about one and a half to two feet. The accused testified next that the deceased told him that they, meaning the company, had been waiting for an opportunity to get him out of the company. At that point, the accused said that he felt pressure to his head and that he felt that his head was on fire and burning. He said that the both of them then carried on saying things to each other and this went on for a while.

[70] The accused said that he then reminded the deceased about a meeting held the previous day involving four persons (including Ah Loo 'deceased', David and two others) and that there was a discussion where it was decided that the compression processing was his work scope and that he was not satisfied because the deceased had interfered with his work function. The deceased then told him "I do not care, you do it". The accused said that the deceased threatened to fire him and he asked the deceased who are you to fire me and told the deceased that he had no authority to fire him. The accused said that while the deceased continued to swing the cable like object over his head, he pointed to his name tag which he was wearing at the time. At the point when the cable like object hit the accused on his left shoulder for the second time, he said that he was angry and as he turned his body to take an instrument lying on a table behind him to defend himself, the deceased punched his spectacles. The accused said that when he swung around his body to take the object, his back was towards the table. He said the table was messy and that he was not aware of what object he took. As he took the instrument with his right hand he raised his left hand to protect himself as he was afraid that the cable like object would hit him. He said that the reason he took the instrument was that he was afraid that if the cable like object were to hit his head, he would die and he therefore needed to protect himself. With the instrument in his hand, the accused said that he then stabbed the deceased three times in the stomach.

[71] The accused then said that at the time he stabbed the deceased, he did not know or foresee what injuries the deceased would sustain. At the time, he said that he thought that after he stabbed the deceased, he would be injured and that he would then run away. After he stabbed the deceased he immediately released the instrument from his hand, and after the deceased saw that he was bleeding he shouted "ah" and immediately sat down on the floor. After he saw this, he said he stood up. He said that he stabbed the deceased in the stomach as he was seated while the accused was standing. He testified that his condition at the time was that he was angry and had difficulty breathing. He said he was not in control of his emotions at the time. The accused then said that after the deceased sat down on the floor, he saw a worker from Myanmar standing at the door to the store room and looking in. After that he said the Myanmar worker then left and went away.

[72] The accused then left the store room with his head hung downwards and walked towards the direction of the Human Resource and Administration Department (HRD). He said that the reason why he went to the HRD was because the manager of the HRD, Low Kwong Fei, SP4, said if there were any issues in the company he was the one that the workers normally saw. As he entered the HRD he saw SP4, and told him that he had stabbed the deceased three times in the stomach. When SP4 asked why he did this, he said that the deceased had messed up the things in his

workstation. The accused then said that SP4 told him that he had caused a problem in the workplace to which he said he replied that he came to Malaysia in order to earn a living in order to pay the education fees of his child and that he never anticipated that such a thing would happen. He was then asked to go out of the room and to wait outside but this area was still within the HRD. The accused testified that at the time, his movements were not confined or restricted in any manner whatsoever and he did not go anywhere. No one, he said, came over to speak to him at the HRD. After sometime he said, the police arrived and he was handcuffed and taken to the store room where the incident occurred. He then said that he was brought to the hospital where a sample of his blood was taken. Counsel for the accused also applied to tender the statement given by him under the provisions of s. 112 of the Criminal Procedure Code.

DW2

[73] The defence then called Khoo Kee Yu, DW2, who was an employee at Press Metal Sdn Bhd. DW2 said he worked for more than nine years in the company. He said he knew the accused and when there were problems with any machines, the accused was the one they usually looked for to repair the machines. He said he also knew the deceased and that the deceased got along well with everyone in the company. DW2 also said he knew David both not that well. DW2 said that their direct superior was Lim Kian Kuat whom most of them called KK Lim. KK Lim, he said was the one in charge of management. He said that KK Lim was not Lee Hee Fun. DW2 said that on the day of the incident, he saw the deceased being carried out by four workers including one contractor. He said that he then went over and carried the deceased by himself as he saw that they were carrying him very slowly. When he arrived at the guard house with the deceased, he noticed that the deceased was bleeding from the chest region and he opened the shirt buttons and tried to stop the bleeding. He said the wounds were in the chest and stomach area. Lee Hee Fun was with him at the time but later he did not notice him. After lunch time on the day of the incident, he received a telephone call from David who was at the time in the Tesco hypermarket which he said was about five kilometres from the factory. He said that David told him that he was frightened and as a result he left the factory premises. David did not tell DW2 why he was afraid. DW2 said that the interval between the incident in the factory and David's telephone call was about two to three hours. DW2 said that he did not meet David that day and that he did not know what was the relationship between the deceased and the accused, between David and the accused and between David and the deceased. DW2 said that he never met David again after the incident. He said that he knew that David had passed away after he fainted at the factory and that he did not attend his wake service.

DW3

[74] DW3 was Detective Sub-Inspector Tee Ann who was the recording officer who recorded the statement of the accused. The statement of the accused was tendered and marked as exh. D33. DW3 said that after the statement was recorded, he read it back to the accused and asked him to sign it. The accused however, refused to sign the statement because there was no interpreter from his embassy that was present there and also because he did not trust DW3. DW3 said that the accused cooperated with him throughout the recording of the statement. DW3 said also that the whole conversation with the accused was in Mandarin which he said the accused understood.

Duty Of The Court At The End Of The Defence Case

[75] The duty of a trial court at the conclusion of the defence case is set out in s. 182A of the Criminal Procedure Code which reads as follows:

> 182A – Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[76] The operative word in s. 182A above is the word "all" meaning that the court must consider all the evidence adduced in order to come to a proper finding as to the guilt of the accused. In *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21; [2013] 3 MLJ 773, the Federal Court observed as follows:

> At the conclusion of the trial, s 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well established principles enunciated in *Mat v. Public Prosecutor* [1963] 1 LNS 62; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence.

[77] In *Prasit Punyang v. PP* [2014] 7 CLJ 392; [2014] 4MLJ 282 it was held as follows:

> In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the duty-bound of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term all the evidence. The emphasis must be on the word all.

[78] The phrase "reasonable doubt" is not defined in s. 182A of the Criminal Procedure Code. However, case law has set out what amounts to a reasonable doubt. In *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16 it was held by Sharma J that:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[79] In the case of *Liew Kaling & Ors v. PP* [1960] 1 LNS 60; [1960] MLJ 306 Thompson CJ referred to the quantum of proof required to prove a case "beyond reasonable doubt" when he quoted the judgment of Denning J (as he then was) in the case of *Miller v. Minister of Pensions* as follows:

> The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will suffice.

[80] Denning J went on to observe further in the *Miller*'s case:

> That evidence that is in the least probable must be evidence that is credible, plausible or logical such that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred, or as truthful or accurate; and not a doubt that could, with the application of some ingenuity, be conjured up, envisioned or visualised in a story.

[81] In the case of *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180 Abdoolcader J (as he then was) explained the phrase reasonable doubt as follows:

> It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night.

[82] Apart from what amounts to a reasonable doubt as indicated from the cases above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is

A that as encapsulated in the time honoured decision of *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 where it was held by Suffian J (as he then was) as follows:

> The position may be conveniently stated as follows:
>
> B (a) If you are satisfied beyond reasonable doubt as to the accused's guilt ... Convict.
>
> (b) If you accept or believe the accused's explanation ... Acquit.
>
> (c) If you do not accept or believe the accused's explanation ... Do not convict but consider the next steps below.
>
> C (d) If you do not accept or believe the accused's explanation ... and that explanation does not raise in your mind a reasonable doubt as to his guilt ... Convict.
>
> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt
> D ... Acquit.

[83] The approach in *Mat v. PP* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 when it held:

E

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take
> F into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict
> G him on the evidence now before me? If the answer to that question is 'Yes', then a *prima facie* case has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;
>
> (iii) after the defence is called, the accused elects to remain silent, then
> H convict;
>
> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263.

[84] Following from the above, if the court does not accept or believe the
I defence raised by the accused it must not convict but must proceed a stage further by considering whether the defence evidence has raised in the mind of the court a reasonable doubt as to the guilt of the accused. If it does, then the accused is nevertheless entitled to an acquittal.

[85] In the light of the above well-defined principles, this court, being so guided, proceeded to undertake the evaluation of the evidence for the defence.

Evaluation Of The Defence Case

[86] From a perusal of the evidence led by the defence it appears that the defence mounted is four-fold in nature although to some extent it does overlap. The first, is that the accused was not the person who inflicted the fatal wounds but someone else did and therefore the accused ought to be acquitted outright. The second basis upon which the defence proceeded was that while the accused, by inflicting the fatal wounds had the necessary *mens rea* to commit on offence amounting to that of culpable homicide not amounting to murder under s. 299 of the Penal Code, he did not possess the necessary intention to commit murder under s. 300 of the Penal Code. The third basis upon which the defence case proceeded was that even if the accused did inflict the fatal stab wounds he was provoked while the fourth was that the fatal wounds were inflicted during a sudden fight. The first of the four basis of the defence led would, if successful, result in the accused being acquitted outright, the second would result in him being found guilty of culpable homicide not amounting to murder while the other two would, by reason of the exceptions to s. 300 also result in him being found guilty of culpable homicide not amounting to murder. All of these will now be considered in turn.

It Was Not The Accused Who Inflicted The Fatal Wounds

[87] The defence case was that although the accused had inflicted stab wounds to the stomach of the deceased, the fatal wounds no. 4 and 5 were not caused by the deceased but by someone else. The prime suspect, according to the defence was a co-worker of the deceased and the accused by the name of David. No evidence of David's surname was never given in evidence. The evidence of the accused in this respect has been referred to above and it serves no purpose to repeat it. Suffice to say that it was the defence case that the window of opportunity for David to have inflicted the fatal stab wounds was the interval of time that had elapsed between SP7 exiting the store room to get help and the time taken subsequently for the two managers, namely, Lee Hee Fhun and Ah Yew to reach the store room and after the accused had exited the store room. This lapse of time can, from the evidence adduced, be inferred to have been no more than two or three minutes at the most. It must be remembered also that according to the accused's own testimony, David had exited the store room after an argument had purportedly ensued between him and the deceased seemingly to provide the backdrop and to set the stage for the re-entry of David a while after the accused had stabbed him, to then inflict the fatal wounds on the deceased as retribution for the argument that had occurred only moments before. It is therefore somewhat befuddling for the accused to then testify that the deceased had in the course of the altercation with him, in the very next

A minute, sing the praises of David by telling him "Apa you buat David pun boleh buat" (What you are doing, David also can do). The accused also testified that as David exited the store room, the deceased shouted to him that he was to be back in three minutes time. This, the court finds, was no more than an invention by the accused to conveniently and cleverly place David B at the scene of the incident some minutes later. Apart from this, there was no independent evidence to suggest David's presence at the store room when the incident took place. The accused also testified that at the time the deceased and David were quarrelling, they spoke in a language he said he did not understand which he said could have been in Cantonese. However, he C said that when the deceased shouted at David to be back in three minutes, he understood as they had then changed the dialect to Mandarin. Once again, it is the finding of this court that this is a mere invention on the part of the accused to cleverly set the stage for the alleged re-appearance of David at the scene of the crime a few minutes later. It is also pertinent to note that the accused also never mentioned David's alleged involvement in the incident D when he told SP4 what had happened just minutes after. If the accused had felt strongly that David had a part to play in the episode, he would have undoubtedly told SP4 about it. It is also noteworthy to mention that the accused had never mentioned about the fact that David and the deceased had a quarrel in his recorded statement to the police which was tendered by the E defence and marked as exh. D33. All that the accused mentioned in exh. D33 was that that David had gone in to look for parts and had then left the store room. It is therefore the finding of this court that the alleged quarrel between David and the deceased in all reasonable probability never took place. The evidence of DW2 who testified that on the day of the incident he received F a telephone call some two to three hours after the incident from David telling him that he was frightened and so he left the factory premises also is of no assistance to the defence. DW2 never testified as to what David had meant when he said that he was frightened. It could mean any number of things and in the absence of any clear indication as to what he had meant, it remains G mere speculation and it is not the province of this court to indulge in speculation. DW2 also admitted that he never gave any statement regarding the telephone call he received to the police. Furthermore, if David was fearful he could have gone to the police and lodged a contemporaneous report as to why and of whom he was fearful off. As alluded to earlier, the interval of time for David or anyone else to have stolen in unnoticed and to inflict H the fatal wounds and exit undetected just as fast is hardly probable in the circumstances. Moreover, contrary to the accused's testimony, there was no presence of any stab wounds to the deceased's stomach and in any event, certainly not two of them. The accused admitted in court during cross-examination that he was taller and bigger in size than the deceased. From the I position and angle (45%) of stab wounds No. 4 and 5, it is more probable that the accused was in a standing position when he inflicted those wounds

upon the deceased chest area contrary to his testimony that he was seated when he inflicted the wounds to the deceased's stomach. It was also the contention of the defence that if it was the accused who inflicted the fatal stab wounds No. 4 and 5 upon the chest of the decease, the amount of blood that would have emitted would be in a larger volume than that testified to by SP7 when he said that the deceased had a bloodstain on his stomach region about the size of a palm. The evidence of SP11 provides a sufficient response to that when she testified that it is possible that the blood can lodge in the chest cavity area and so can provide some restraint to the outflow of blood. The defence also contended that from the difference in the nature of wounds No. 4 and 5 from that of wound No. 6, it is possible that the wounds were inflicted by two different people. They submitted that wounds No. 4 and 5 shares certain similarities in that both have a downward angle and were inflicted within a 45% position with the sharp edge of the weapon facing outward. Wound No. 6 to the contrary, was inflicted with an upward angle and did not cause any major injuries as did the other two non-fatal wounds. The defence therefore contended that it was not possible for the accused to have inflicted the fatal wounds unless he had quickly changed the position of his handling of the weapon while inflicting all of the injuries sustained. However, SP11 testified that in a scuffle between an assailant and the victim it is possible that the respective positions of the two may change. This in turn could account for the fact that the other non-fatal wounds to the deceased were inflicted from a different angle and with the sharp edge of the weapon facing in the opposite direction. The defence also raised the issue that SP7 agreed that from the time he first saw the deceased until the time he saw the deceased being carried out, his appearance had changed physically. SP11 testified that from the abrasions to the deceased as evident from photographs 15 and 16 of exh. P6, it is consistent with him falling on a hard and rough surface. This evidence of SP11 is in accord with the reasonable probabilities of the case which is that after SP7 saw the deceased in a sitting position, he would have fallen face downwards causing both the abrasions to the face and to the broken spectacles (the deceased wore spectacles) found at the scene belonging to the accused. This accounted for the altered physical appearance of the deceased as testified to by SP7.

[88] In summary, it is from the evidence before the court, difficult to believe the accused's version about the involvement of David as the person who had stolen in but for a moment and inflicted the fatal wounds upon the deceased nor has it raised a reasonable doubt in the mind of this court as to the guilt of the accused.

(ii) No Intention To Commit Murder Under S. 300 But Only Culpable Homicide Not Amounting To Murder Under S. 299

[89] This has already been considered at the end of the prosecution case and it is not proposed to repeat them save to stress that from the nature of the weapon used, the position of the injuries inflicted, being as they were to

A the vital organs of the heart and lungs and considering the number of stab wounds sustained, and viewed in terms of the degree of risk to human life, it is reasonable to infer that death was in all the circumstances of the case, the most intended and probable result. It is axiomatic that intention or *mens rea* is not something capable of being established by direct evidence; it is a B matter of inference. It could be gathered from all the facts and circumstances prevailing in the case, see *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497, *Tham Kai Yau & Ors v. PP* (*supra*), *Virsa Singh v. State Punjab* (*supra*). In the premises, this court finds that the accused had the necessary intention and *mens rea* to commit murder as defined under s. 300 C limb (c) of the Penal Code. His defence has also failed to raise a reasonable doubt as to his guilt under s. 300(c) of the Penal Code.

(iii) Provocation

[90] The defence submitted, in the alternative, that the accused was provoked when he inflicted the stab wounds to the deceased. Provocation D operates as an exception to the offence of murder under s. 300 of the Penal Code.

[91] It is pertinent to quote *verbatim* the exception of provocation. Exception 1- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, E causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[92] The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the F offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

G (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

[93] Explanation - whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

H **[94]** Before proceeding to consider the elements of the exception of provocation, it is also pertinent to consider the burden on an accused where he relies on an exception in the Penal Code. The relevant section is s. 105 of the Evidence Act 1950 and it reads as follows:

> 105. Burden of proving that case of accused comes within exceptions
>
> I When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso

contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[95] The relevant accompanying illustration is that under illustration (b) and is as follows:

A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self- control.

The burden of proof is on A.

[96] The classic common law definition of provocation can be found in the case of *R v. Duffy* [1949] 1 All ER 932 where Devlin J said:

Provocation is some act, or series of acts done (or words spoken) ... which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of himself.

[97] The provocation must be grave and sudden. This is a question of fact in each individual case. *Dr Sri Hari Singh Gour's Penal; Law of India*, vol. 3 (Law Publishers (India) Pvt Ltd, 11th edn revised, 2011), declares "sudden" as follows (at p. 2498):

What it is said that the provocation must be "sudden" it is implied that it should have all immediately preceded the homicide in point of time. A person may repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw.

[98] In *Mahmood v. State* AIR 1961 All 538, Oak J had noted (at pp. 538-539):

Whether the provocation was sudden or not does not present much difficulty. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation.

[99] Back to our shores and in a recent case by the Court of Appeal in *Rikky Purba v. PP* [2014] 3 CLJ 607; [2014] MLJU 72,the court reviewed the authorities on provocation and in doing so, *inter alia,* also pronounced on the applicable burden where such an exception is relied upon by an accused. This is what they had to say:

It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC (see section 105 of the Evidence Act).

[100] Was the provocation given by the deceased grave and sudden? This, as the established authorities have held, is a question of fact. The evidence relied upon by the defence in raising provocation are as follows. Firstly, the deceased had accused him of having a spare part to a machine which the accused had denied. Secondly, the deceased in his attempt to look for the cable had messed up his things in the cabinet and the deceased while engaged in the process of rummaging through the cabinet had stumbled upon a personal diary of the accused, which did not in the least amuse him. The accused also said that the deceased had swung an object resembling a cable (cable) over the head of the accused.

[101] As the deceased swung the cable over the head of the accused, the accused told him not to as he already had a financial problem with his child's school fees. The deceased then, while pointing to his head told him "Your brains have a problem, everything also you know". The deceased then told him "Do not lie to us, what you are doing David can also do". As the deceased spoke to him, he was still swinging the cable over his head. The cable, according to the accused, did not touch his head but touched his left shoulder. The accused then scolded the deceased and told him that he was just the pupil and that he, the accused was the master. The distance between the accused and the deceased while all this was going on was about 1 ½ to 2 feet. The deceased then told the accused that we had been waiting to get him out of the company. By we, the accused testified, the deceased meant the company. The accused said his reaction to this was that he felt as though his head was on fire. The deceased then reminded him of a meeting held the day before that had clearly defined the accused's scope of work and that he was not satisfied that the deceased had interfered. To this the deceased replied that he did not care. The accused then testified that the deceased continued to swing the cable over his head while he showed him his name tag. The accused then while sitting then turned his body in order to get something to defend himself was punched by the deceased on his spectacles. The accused also said that he took the object as he was afraid that the cable would hit his head and that he would end up dying.

[102] From a distillation of the foregoing narrative that formed part of the defence testimony, it resolves itself into two main issues. Firstly, whether the swinging or waving of the cable over the head of the deceased and secondly, whether the uttering of the words used by the deceased on the accused was sufficient to cause the accused to be deprived of his self-control?

[103] If it was, the next stage of inquiry would be whether the injury inflicted was proportionate to the provocation. As will be seen shortly, it is trite that the test of whether provocation exists is to be judged by the standard of the reasonable man. That being the case, in the assessment of the reasonableness of the accused's action, it has to be considered as of necessity whether a reasonable man would be so provoked as to act as the accused did.

Therefore it must follow that if a reasonable man would not have resorted to the degree of retaliation as the accused did, then it must also follow that the proportionality of the reaction to the provocation would be a relevant factor to consider. If there is any doubt that the consideration of proportionality is relevant to the issue of provocation, I need only refer to the case of *Bangkong Puan v. PP* [2012] 1 LNS 950; [2013] 1 MLJ 293 where it was held:

> The appellant alleged that the deceased stabbed him first and it was this act of grave and sudden provocation that purportedly caused him to lose his self-control and retaliate. We find that even if this allegation was true, the brutal manner in which the appellant retaliated was not proportionate to the provocation.

[104] As alluded to earlier, the test of whether provocation exists is to be judged by the standard of the reasonable man. See *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162; [1988] 1 MLJ 251 which held as follows:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v. State of Maharashtra* (1962) AIR SC 602).

[105] Would a reasonable person act as the accused did under the circumstances? Cumulatively taken, the acts relied upon to show evidence of provocation on the part of the accused were that the deceased had uttered certain words which had the effect of belittling and challenging the position, authority and seniority of the accused in the company. If this was done in front of other colleagues, it is reasonable to assume that the accused would have had a case for saying that he had "lost face" and had been so affected by the shame of the deceased's mockery so as to cause him to act as he did. However, here it is not in dispute that the words were uttered only in the presence of the accused. If he felt annoyed at what the accused had told him, the accused who by his own admission was taller and bigger than the deceased, could have just pushed him away. Why was there a need to resort to the drastic measure of using a sharp weapon to inflict several stab wounds to the deceased? It is therefore this court's finding that the manner in which the accused reacted to the verbal insults of the deceased is not the reaction of a reasonable man under the circumstances. It is also the finding of this court that from the factual matrix of the case, the provocation given by the deceased as alleged by the accused was neither grave nor sudden in nature.

[106] With regard to the use of the cable, it is the finding of this court that it is highly unlikely that the cable was used by the deceased to cause the provocation. On the contrary, the evidence of the pathologist, SP11, was that the abrasions suffered by the deceased on his arm could have been caused by blunt force trauma. When SP11 was shown the cable, she said that that could

A have the object that caused the abrasions. The chemist report, exh. P17, clearly evidenced that the blood found on the cable was that of the deceased. This leans toward the inference that it is more probable that the cable was used by the accused to hit the deceased and not the other way round.

B **[107]** This court also finds that the act of the accused in stabbing the deceased is out of all proportion to the provocation given by the deceased. Even assuming that the accused is to be believed in that he was afraid that the cable would hit his head resulting in his possible death as he testified, it was unnecessary for the accused to have used the weapon to stab the deceased. He could have, in the first instance moved away from the deceased C and in the worst case scenario he could have taken flight out of the store room or as suggested earlier, could have just pushed the deceased aside. Still on the issue of proportionality, it must be remembered that the stab wounds inflicted numbered no less than five, the depth of each wound being on the average three centimetres. The fatal wounds no. 4 and 5 were directed to D vital organs, namely the heart and the lungs. The evidence of SP11 and her report also confirmed that the rib bones were cut right through which she said could only be achieved by using more than moderate force. It is also important to add that given the fact that the provocation must emanate from what the deceased said or did, what the accused had said about his personal E financial problems and current working conditions cannot be considered relevant for the purposes of determining whether the accused in all the circumstances was subject to grave and sudden provocation. In all of the circumstances therefore, this court finds that the accused has failed on a balance of probability to bring himself within Exception 1 to s. 300 of the Penal Code namely, provocation.

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(iv) Sudden Fight

[108] Exception 4 to this exception to s. 300 of the Penal Code reads as follows – culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, G and without the offender having taken undue advantage or acted in a cruel or unusual manner.

[109] Explanation – it is immaterial in such cases which party offers the provocation or commits the first assault.

H **[110]** The facts upon which this exception arises are similar to that of provocation under exception 1 to s. 300 Penal Code. It is trite law that to invoke the exception, four requisites must be satisfied, that is to say: (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was committed in the heat of passion; and (iv) the assailant had not taken any I undue advantage or acted in a cruel manner.

[111] These requirements are cumulative and must all be satisfied for the exception to apply. On the facts and in the circumstances of the case, this court finds that requirement (iv) to exception 4 above has not been satisfied by the accused. It will be recalled that according to the evidence of SP11 and the post-mortem report, exh. P10, there were five stab wounds inflicted on the deceased, two of which proved to be fatal. This was in purported retaliation for the words uttered by the deceased and his act of swinging the cable over the accused's head while he spoke. It will also be recalled that SP11 had testified that there appeared to be no defence wounds found on the deceased indicating that he was not in a position to defend himself from the attack of the accused. The expression used by SP11 to describe the condition of the deceased after the first few stabs was "altered consciousness" which she said resulted in him being unable to defend himself. It is therefore the finding of this court that the reaction of the accused was out of all proportion to the provocation given by the deceased. This court finds that in the circumstances, the accused's reaction clearly indicated that he had taken undue advantage and acted in a cruel and unusual manner. The allegation by the accused that the cable was swung over his head several times and he defended himself for fear that it might do him harm has already been addressed above and need not be repeated here. In the case of *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497 the court observed as follows:

> The learned judge also found that by using P16 to stab the deceased not once but four times including once when the deceased had collapsed, obviously reflected a situation where the appellant had taken advantage or acted in a cruel or unusual manner thereby failing to pass the second test required under exception 4. It was not disputed by the defence that P16 was used by the appellant to inflict those injuries on the deceased. Hence the appellant failed also under exception 4.

[112] This court therefore finds that the accused has under the circumstances failed on balance of probabilities to bring himself within exception 4 to s. 300 of the Penal Code, namely, that of sudden fight.

(v) Self Defence

[113] Though not specifically raised, the accused did in his testimony say that as the deceased swung the cable over his head, he reacted by turning to reach for an object, which happened to be the weapon in order to defend himself, as he was afraid that he would be injured. In cases where an accused does not specifically refer to a particular defence, it has been held that it is nevertheless the duty of a judge to consider any defence that is raised by the presented evidence. This was decided by the Federal Court in the case of *Abdul Aziz Mohamed Shariff v. PP* [2010] 5 CLJ 733; [2010] 6 MLJ 759 which held as follows:

A So the primary issue before this court is whether the courts below had erred in arriving at their decisions when they failed to consider this available defence of intoxication, despite the appellant not having raised this at any time during trial at first instance and on appeal.

It is a long established principle that: A defence however weak and
B whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury, *R v. Dinnick* (1909) 3 Cr App R 77; *Richards* 4 Cr App R 161; *R v. Hills* (1987) 86 Cr App R 26. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it *The King v. Hooper* [1915] 2 KB 431; (1915) 11 Cr App R 136 and even if it is
C inconsistent with the defence *Rex v. Thorpe* 41 TLR 468; 18 Cr App R 189. The judge has great freedom in pointing out to the jury the value of the evidence or the improbability of the defence provided he puts the defence fairly to the jury. Further, if there is no evidence which might reduce a charge of murder to a lesser offence the judge should not leave the question of the lesser offence to the jury - per McElwaine CJ in *Rex v. Ong*
D *Choon* [1938] MLJ 227.

This was repeated by the Court of Appeal in *Loo Geok Hong v. Public Prosecutor* [1960] 1 LNS 65; [1961] MLJ 157 where at Thomson CJ advised:

> Now, generally speaking, as a matter of law a judge sitting with a jury should put to the jury any defence available on the evidence
E irrespective of whether or not reliance has been placed on that defence at the trial or indeed irrespective of whether or not it has been mentioned by counsel at the trial.

Again this was reiterated by the Supreme Court in *Ramlan bin Salleh v. Public Prosecutor* [1987] 2 CLJ 300; [1987] 2 MLJ 709 at p 158:

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> In jury trial, the first duty of the judge in dealing with the defence case is to put to the jury the defence put up by the accused even if such defence appears to him to be too far-fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not
G amounting to murder. The trial judge is of course at liberty to comment on the evidence and in rare and appropriate cases may even make unfavourable remarks on the defence put up by the accused provided he makes it very clear to the jury that they are not bound by his view and opinion on issues of fact. His next duty is to put to the jury all available defences whether or not relied
H upon by the accused, having regard to the evidence. But as was held by the Court of Appeal in *Loo Geok Hong v Public Prosecutor* [1961] MLJ 157 p 711, the way in which the jury is to be directed on available defences is a matter for the trial judge having regard to the evidence with which he is concerned. What is important is the effect and not the form of the direction.

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> As jury trial has been abolished, the law is clear that it is still incumbent upon the trial judge to direct himself to any available defences, whether raised or not raised by the accused, from the evidence before him.

[114] Sections 96-106 of the Penal Code codifies the law relating to right of private defence of person and property including the extent of and limitation to exercise such right, see *Rajinder v. State* (1955) 5 SCC 187. Section 96 of the Penal Code states:

> Nothing is an offence which is done in the exercise of the right of private defence.

[115] There are four critical justifications stated in *Ratanlal and Dhirajlal's Law of Crimes* (25th Edn) which must be met before the plea of self-defence can succeed. The four critical justifications are:

(a) the accused must be free from fault in bringing about the encounter;

(b) there must be present an impending peril to life or of great bodily harm either real or so apparent;

(c) there must be no safe or reasonable mode of escape by retreat; and

(d) there must have been necessity of taking life.

[116] Section 105 of the Evidence Act 1950 places the burden of proving the existence of circumstances bringing the case within any general exception in the Penal Code is upon the accused. The facts of the case clearly show that, firstly, in spite of the accused's testimony, there was no impending peril to his life or of great bodily harm when the deceased swung the cable over the head of the accused. By the accused own admission, he said that the cable never touched his head but only his shoulder even though the accused had swung it more than once. Given that, it would not be reasonable for the accused to say that he feared that the cable would cause death to himself should it hit his head. Further, as has already been mentioned above, the only blood found on the cable was that of the deceased.

[117] Further as already considered above, the accused, being taller and bigger in size to the deceased could have either pushed him away or have taken flight from the scene and so escaped by way of retreat. The number of stabs wounds inflicted upon the deceased also was not proportionate in the circumstances of the case as the deceased was not armed with any weapon and certainly even if one were to accept the cable as having being swung over the accused's head by the deceased, the manner of retaliation by using such a weapon and aiming for the vital organs of the deceased was out of all proportion in the circumstances.

[118] In the circumstances therefore, this court finds that the accused has failed on a balance of probabilities to show that he is entitled to rely on the exception of self-defence.

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Decision Of The Court

[119] Following from the foregoing, it is therefore the finding of this court that the defence has failed to discharge the burden of proving the existence of circumstances bringing its case within any of the exceptions referred to above on a balance of probabilities, as are contained in the Penal Code, and has also failed to raise a reasonable doubt in the prosecution case for murder under s. 302 of the Penal Code. This court therefore finds the accused guilty of murder punishable under s. 302 of the Penal Code. The court therefore sentences the accused to the only sentence permissible by law, that is to death by hanging.

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